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No. 3-09-0782

Order Filed May 6, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	For the 10th Judicial Circuit
)	Peoria County, Illinois
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-1560
)	
LADARIUS EGGLESTON,)	
)	Honorable Michael Brandt,
Defendant-Appellant.)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

Held: Under plain error review, defendant Ladarius Eggleston was prejudiced by the omission from the jury instructions of factors that went to the certainty shown by the identifying witness and the length of time between the offense and the identification confrontation.

Defendant Ladarius Eggleston appeals from his conviction and sentence for attempted armed robbery. Because we find Eggleston was prejudiced by the omission of two of the five factors indicated under Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000), "Circumstances Of Identification," we reverse the trial court and remand the cause for further proceedings.

FACTS

Defendant Ladarius Eggleston was indicted on a charge of attempted armed robbery. 720 ILCS 5/8-4(a);18-2(a)(2) (West 2008). At the ensuing jury trial, the following evidence was adduced.

Matthew Trimble of the Peoria police department testified that on December 2, 2008, at approximately 11:00 a.m., he was dispatched to the location of a dry cleaning establishment in Peoria in response to an attempted robbery. When Trimble arrived, he spoke with a clerk of the business. After the clerk gave Trimble a description of the suspect, a tall, thin, black male wearing all black clothing and armed with a black handgun, Trimble and other officers canvassed the area. Their search produced no results. The clerk also informed Trimble of her belief that she knew the suspect and had recognized him from previous encounters in the store. The clerk told Trimble the suspect went by the street name of “LD.”

Alycia Albert testified that on December 2, 2008, she was a clerk at Biehl’s Cleaners. At approximately 11:00 a.m. she was in the establishment alone. Albert was in the back of the store when she heard someone come in. She walked to the front of the store and a man came to the back of the counter, put a gun in her face and told her to show him the safe. Albert said to the male, “don’t I know you?.” When he responded, “no,” she stated, “yeah, I do, you’re LD, you’re [B]oogie’s brother.” The male denied Albert’s identification and when Albert said she was going to phone the police, he fled. The entire encounter was over in a matter of seconds. Albert testified the attempted robber was wearing black pants, a black hoodie and a black mask. Albert could see his eyes through a rectangle opening in the mask. He was also wearing gloves. The handgun the attempted robber used was black with a silver scratch on the side. Albert testified that she initially

thought the incident was a joke. After the male fled, she phoned the police. Albert identified the male in court as the defendant, Eggleston, also known to her as “LD.”

Albert testified that at the time of the attempted robbery she recognized Eggleston by his voice and height. She had heard him speak when he came into the store with a mutual friend, Niko. Albert had seen Eggleston two or three times. The most recent time she had seen him in the store was “a couple weeks” before the attempted robbery. At that time, Eggleston was in the store with Niko for 10 to 15 minutes. He was talking on the phone while Albert spoke with Niko. During the attempted robbery, Eggleston referred to Albert by her nickname, “Leash.” She was not wearing a name tag when she was working in the store. Albert did not tell the responding officers that she was positive it was Eggleston, however, she told them she believed it was him. She likewise testified at trial.

Jatara Johnson testified Eggleston was her ex-boyfriend. Johnson stated that Eggleston admitted to her that he attempted to rob Biehl’s Cleaners. He did not give her any details. Johnson admitted she was subpoenaed to testify.

Following the close of the evidence, the trial court discussed the jury instructions with the State and Eggleston’s counsel. The trial court proffered the State’s instruction “10, 3.15,” the Circumstance Of Identification” instruction. Eggleston offered no objection to the instruction and the trial court stated it as “[g]iven.” When the trial court instructed the jury, it stated:

“When you weigh the identification testimony of a witness,
you should consider all of the facts and circumstances in evidence,
including but not limited to the following: The opportunity the
witness had to view the offender at the time of the offense. The

witness's degree of attention at the time of the offense. The witness's earlier description of the offender.”

Before the jury retired to deliberate they were given the written jury instructions. The identification instruction was as stated by the trial court. Included in the written instruction, but stricken, “as modified” and followed by the initials, “MB,” indicating the trial court, was the following language:

“The level of certainty shown by the witness when confronting the defendant.

The length of time between the offense and the identification confrontation.”

The jury found Eggleston guilty and the trial court denied his motion for a new trial. The trial court sentenced Eggleston to 10 and one-half years' imprisonment and denied his motion for reconsideration of sentence. Eggleston was also assessed a \$200 DNA fee and ordered to submit a DNA sample. Eggleston follows with this appeal.

ANALYSIS

On appeal, Eggleston argues two issues. First, he asserts that the trial court abused its discretion in giving a modified pattern jury instruction with respect to the issue of witness identification testimony or, in the alternative, that his trial counsel was ineffective for failing to object to the modified version of the pattern jury instruction. Eggleston's second argument is that he was wrongly assessed a fee for DNA analysis because he had previously submitted a DNA sample.

In response to Eggleston's first argument, the State asserts that any error on the part of the trial court is forfeited because Eggleston failed to raise the objection in the trial court. See *People*

v. Herron, 215 Ill. 2d 167, 175 (2005) (“Generally, a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion”). Acknowledging this failure, Eggleston requests this court review any error under the plain error doctrine. An exception to procedural forfeiture, plain error review is appropriate where the evidence is closely balanced or the error affects a substantial right. *Herron*, 215 Ill. 2d at 178-79. With respect to jury instructions, the plain error doctrine is coextensive with Supreme Court Rule 451(c), which provides that “substantial defects” in criminal jury instructions “are not waived by failure to make timely objections thereto if the interests of justice require.”(Internal quotation marks omitted.) *People v. Piatkowski*, 225 Ill.2d 551, 564 (2007) (quoting Ill. S. Ct. Rule 451(c) (eff. July 1, 2006)). A plain error analysis begins with the determination of whether error occurred. *Herron*, 215 Ill. 2d at 184.

Jury instructions convey the legal rules applicable to the evidence presented at trial. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). Under supreme court rules, trial courts are required to use the Illinois Pattern Jury Instructions (IPI) that are applicable to the facts and law of the case and that are correct statements of law. *People v. Rodriguez*, 387 Ill. App. 3d 813, 822 (2008); Ill. S. Ct. Rule 451(a) (eff. July 1, 2006). As such, the pattern instructions, if applicable and accurate, are mandatory. *Rodriguez*, 387 Ill. App. 3d at 822. A corollary to this rule is the concept that instructions which are not supported by either the evidence or the law should not be given. *Mohr*, 228 Ill. 2d at 65. The trial court has the discretion to determine whether a particular instruction should be given. *Mohr*, 228 Ill. 2d at 65. As a court of review, our task is to determine whether the instructions at issue, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. *Mohr*, 228 Ill. 2d at 65.

In the instant case, the State asserts there was no error in withholding the fourth and fifth factors in the IPI Criminal No. 3.15 jury instruction at issue because those factors were not applicable to the evidence presented at trial. See Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.15). Specifically, the State argues that the fourth factor, “[t]he level of certainty shown by the witness when confronting the defendant,” applies only to those circumstances when a witness identifies the defendant while he is in police custody or in a line-up, or other identification procedure. We disagree.

The IPI committee note instructs trial courts to give IPI Criminal 4th, No. 3.15 when identification is an issue. *Rodriguez*, 387 Ill. App. 3d at 822-23; IPI Criminal 4th, No. 3.15, Committee Note at 107. The five factors of IPI Criminal 4th, No. 3.15, have been dubbed the *Biggers* factors and our supreme court has held that they are an accurate statement of the law “ ‘for assessing the reliability of identification testimony.’ ” *Rodriguez*, 387 Ill. App. 3d at 823 (quoting *Piatkowski*, 225 Ill. 2d at 567). It is well-settled that the five *Biggers* factors should be considered in determining the reliability of identification evidence. *Rodriguez*, 387 Ill. App. 3d at 823; see *Herron*, 215 Ill. 2d at 190-91 (IPI committee notes suggest IPI Criminal 4th, No. 3.15, was created to help jurors negotiate the hidden complexities of identification testimony). In *Herron*, the court rejected a version of IPI Criminal 4th, No. 3.15 in which the trial court, in reciting the instruction, injected the word “or” between each of the five *Biggers* factors. *Herron*, 215 Ill. 2d at 188-89. The court in *Herron* recognized that the *Biggers* factors are not mutually exclusive. *Herron*, 215 Ill. 2d at 189. The *Herron* court agreed with those courts in which it has been stated that where supported by the evidence, all the *Biggers* factors should be considered and weighed in determining whether an identification is reliable. *Herron*, 215 Ill. 2d at 189.

Although, as the State points out, the cases heretofore concerning the certainty of the witness's identification have generally involved the identification of defendants in police custody, or identification through line-ups or other procedures, we are not persuaded that it is only under these circumstances that the full compliment of *Biggers* factors need be included in the jury instruction. We do agree that an omission of any one of the factors may be warranted if the evidence in an individual case supports the omission. For example, as noted in *Rodriguez*, if a defendant introduces into evidence the testimony of an expert in eyewitness identification research to refute the concept that a witness's level of certainty is well-correlated to the accuracy of the identification, the trial court may choose to omit one of the listed factors. See *Rodriguez*, 387 Ill. App. 3d at 823-25. However, there was no evidence of this kind introduced by the State in this case.

In the instant case, the reliability of Albert's identification testimony was clearly at issue. Therefore, all five factors listed in IPI Criminal 4th, No. 3.15 should have been included in the instruction. The State presented no evidence to suggest otherwise and we see no reason to omit from the jury's consideration the fourth and fifth factors, particularly the fifth factor, which deals with the level of certainty shown by the witness. Furthermore, having proposed to the responding officers that Eggleston was the suspect, Albert again identified Eggleston at the trial stage of the proceedings. The fourth factor of IPI Criminal 4th, No. 3.15 has been considered an appropriate instruction when considering the certainty of a witness's "in court" identification. *Rodriguez*, 387 Ill. App. 3d at 826.

In conclusion, we find it was error to omit the fourth and fifth factors from the identification instruction. We do not find however, that the error was so serious as to require reversal regardless of the closeness of the evidence. See *Piatkowski*, 225 Ill. 2d at 566 (noting the *Herron* court implicitly found that giving IPI Criminal 4th No. 3.15 with the "ors" was not so serious as to require reversal

regardless of the closeness of the evidence). Therefore, our next step under a plain error review is to determine whether the evidence was closely balanced. We consider that the evidence in this case was closely balanced.

Albert's identification of Eggleston was the foundation of the State's case against him. Albert testified that she recognized Eggleston's voice and height from previous encounters when he had accompanied a mutual friend to see her. Albert testified that she identified Eggleston at the time of the attempted robbery. She also identified him in court. Nevertheless, Albert also testified she was not positive the attempted robber was Eggleston; she "believed" it was him. She admitted that the attempted robbery occurrence lasted only a matter of seconds and that the suspect, who denied he was Eggleston, was masked. Johnson testified under subpoena that Eggleston admitted to her that he had tried to rob Biehl's. This was the totality of the State's evidence against Eggleston. There was no physical evidence linking him to the crime and the police did not find him in a canvas of the area immediately after the occurrence.

In conclusion, having applied the plain error doctrine to Eggleston's assertion of error, we find that error did occur and that the evidence was closely balanced. For these reasons, we reverse the trial court. Because we have based our disposition on a finding of plain error, we need not address Eggleston's alternative argument that his counsel was ineffective or his argument that he was erroneously required to submit a DNA analysis fee, which was a part of his sentencing. We further note that whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge. *Piatkowski*, 225 Ill. 2d at 565. The relevant inquiry for reasonable doubt purposes is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. *Piatkowski*, 225 Ill. 2d at 565. For purposes of reasonable doubt, a positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction. *Piatkowski*, 225 Ill. 2d at 565. For this reason, we consider that if the jury is properly instructed, the evidence in this case is sufficient to find Eggleston guilty beyond a reasonable doubt and double jeopardy has not attached.

For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and remanded.

Reversed and remanded.